

No. 76-123

Supreme Court, U. S.  
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In the Supreme Court of the United States

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OCTOBER TERM, 1976

DONKIN'S (A CALIFORNIA CORPORATION), PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD  
IN OPPOSITION

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**OPINIONS BELOW**

The opinion of the court of appeals (Pet. App. 25-33) is not officially reported. The Decision and Order of the National Labor Relations Board ("the Board") (Pet. App. 1-24) are reported at 214 NLRB No. 6.

**JURISDICTION**

The judgment of the court of appeals was entered on March 4, 1976, and a timely petition for rehearing was denied on April 28, 1976. The petition for a writ of certiorari was filed on July 28, 1976. The court filed a decree enforcing the order of the Board on August 3, 1976.<sup>1</sup> The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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<sup>1</sup>We discuss *infra* the question whether the petition was timely filed.

### QUESTIONS PRESENTED

1. Whether the petition is out of time and the Court therefore lacks jurisdiction of the case.
2. Whether substantial evidence supports the Board's findings that the Company and the Union reached agreement on the terms of a bargaining contract and therefore that the Company's refusal to execute the agreement violated Section 8(a)(5) and (1) of the Act.
3. Whether the Board properly refused to grant the Company's request for a continuance of the unfair labor practice hearing.

### STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*, are set forth in the petition at p. 3.

### STATEMENT

1. After bargaining conducted on petitioner's behalf by its attorney, E. Day Carman, and on the Union's<sup>2</sup> behalf by its attorney, Ivan J. Potts, the parties agreed to a renewal collective agreement in September 1973<sup>3</sup> (Pet.

<sup>2</sup>Culinary Workers and Bartenders Union, Local 814, AFL-CIO.

<sup>3</sup>In 1965, petitioner became a signatory to the comprehensive collective bargaining agreement (the Bay Area Agreement) between the Union and the Bay Area Association, a multi-employer bargaining association representing various restaurateurs (Pet. App. 7). Later, petitioner withdrew from the Association, and during the 1973 negotiations Carman told Potts that petitioner's only concern was that it not sign an agreement with more onerous terms than the Bay Area Agreement. Potts offered and Carman agreed to accept the Standard Independent Contract which contained the substantive terms of the Bay Area Agreement but without certain language pertaining to the grievance procedure that was directed solely to members of that association (Pet. App. 10-11; Tr. 37-38). "Tr." references are to the transcript of the hearing; "CX" references are to petitioner's exhibits therein; "R." references are to the formal papers, reproduced at "Volume I, pleadings," in the court below. Copies have been lodged with the Clerk of this Court.

App. 10-11). Carman instructed Potts to "send over three copies to me and I will have the employer sign them" (Pet. App. 11; Tr. 37). By letter of October 10, 1973, Potts sent Carman the three copies (Pet. App. 11). Thereafter Carman telephoned Potts seeking clarification of certain clauses of the contract. To Potts' inquiry "if he was backing off the agreement to sign", Carman replied, "no", explaining that his inquiry "was merely for clarification purposes" and that "[h]e wanted to be able to explain [the contract] to his client." Carman and Potts discussed the items after which Carman replied, "[T]hank you very much \* \* \* that does me fine" (Pet. App. 11-12; Tr. 42-43).

After a number of additional queries by Carman as to the meaning of various clauses (Pet. App. 12-13), the attorneys scheduled a meeting for January 8, 1974, to sign the contract (Pet. App. 12). At the outset of the meeting Carman stated, "Now, I know you are expecting me to come in and sign the contract at this meeting, and up until three hours ago I fully intended to come here to sign the contract, but I was informed by \* \* \* Mr. Romer, [petitioner's president] that I could not sign a collective bargaining agreement that contained a union security clause" (Pet. App. 13; Tr. 53, 63). Potts replied, "Wait a minute. This is the first time you have raised anything concerning the signing of this contract \* \* \*, and you are right, it was our understanding it was going to be signed at this time \* \* \*" (Pet. App. 13; Tr. 53-54). Carman agreed but indicated that "there wasn't anything he could do about it" adding that Romer was adamantly opposed to the union security agreement (Tr. 53-54).

The Board, rejecting petitioner's contentions that Carman did not have authority to bind it to an agreement (Pet. App. 17) and that, in any event, no agreement was reached (Pet. App. 15-17), found that petitioner violated

Section 8(a)(5) and (1) by refusing to execute the agreement and ordered, *inter alia*, that it do so (Pet. App. 23).

2. The Board also rejected petitioner's contention that it was denied due process by the Administrative Law Judge's refusal to grant it a continuance. The request for a continuance arose as follows: On February 13, 1974, the Board issued its complaint, setting March 12, 1974, as the hearing date (Pet. App. 2, 6). On March 4, the Company's president (Romer) sent the Board a letter asking for a rescheduling of the hearing date to "the early part of April 1974" because, according to an attached doctor's statement, Romer was ill and was required to convalesce "until the end of March 1974" (Pet. App. 2; R. 12-13). Accordingly, the Board on March 7 reset the hearing for April 3, 1974, at the same time specifying that "[n]o further postponements will be granted" (Pet. App. 2; R. 14).

Meanwhile, on March 6, the Company retained the firm of E. J. Gund and Associates to represent it in the case, and the next day Attorney Stephen A. Gigliotti filed an answer to the Board's complaint denying that Carman was petitioner's chief negotiator (Pet. App. 3; R. 15). Because of other business, Gigliotti thereafter made no attempt to communicate with Carman until March 15 or 18 when he was unable to reach him by telephone (Pet. App. 3; Tr. 7, 16). On March 22 and 27, Gigliotti sent Carman letters to which he did not respond and on March 29 he sent subpoenas to Carman (Pet. App. 3; Tr. 8, 16, CX 1, 2). Carman responded by letter on March 29, informing Gigliotti that he had been out of town, adding "[u]nfortunately because of the lateness of your request, I have already scheduled court appearances on April 3, 1974, and cannot expect to be present on that date. I understand you have been representing Donkin's in this matter since March 6, 1974. It is also unfortunate

that you did not attempt to contact me either by telephone or letter before the dates noted above, because I could have made other arrangements in order to be present on April 3, with sufficient advance notice" (Pet. App. 3; CX 4).

On April 1, 1974, Gigliotti asked the Board's Regional Director for a continuance of the April 3 hearing on the ground of Carman's unavailability on that date. The Director the next day denied the request (R. 17-19).

At the inception of the hearing, which was held in Los Angeles, Gigliotti renewed his motion for a continuance stating, *inter alia*, that he could not properly proceed without the testimony of Carman (Pet. App. 3; Tr. 5-9). Gigliotti also stated that he could not defend his case solely on the basis of testimony from Company President Romer, who was "in the Los Angeles area" on the day of the hearing but not in the courtroom (Pet. App. 3; Tr. 12-15). The Administrative Law Judge denied the request for a continuance (Tr. 21). Gigliotti stated that on the previous day Romer had instructed him "that if there was no continuance granted that [Gigliotti] was not to proceed any further" (Tr. 24). Gigliotti then left the courtroom and the hearing proceeded without him or any other Company representative (Tr. 24-25). After presentation of the General Counsel's evidence, the hearing closed the same day.

Thereafter petitioner's requests for reconsideration and to reopen the record were denied (Pet. App. 6, n. 1).

The Board found no denial of due process in the conduct of the proceeding. It noted that "the subpoena action [against Carman] was initiated so close in time to April 3 that on that date Carman still had one day remaining to move legally to quash the subpoena" (Pet.

App. 3). The Board also noted that "[petitioner's] president, Romer, was present in Los Angeles on April 3 and could have been summoned to give testimony regarding the degree of negotiating authority delegated to Carman" (*ibid.*). And the Board concluded (Pet. App. 4)

\* \* \* \* \*

that Respondent had ample time to prepare and present its defense at the April 3 hearing. The issues in the case were few, clearly defined, and known to Respondent's counsel for nearly a month; Carman was obviously a key witness and immediate steps should have been taken to compel his attendance at an already delayed hearing. No new issues were raised by surprise at the hearing. With appropriate and timely deliberation, Respondent could have introduced at the hearing any testimony which it now contends the Board should accept as new or previously unavailable evidence. Instead, the Respondent, both expressly and by neglect, voluntarily chose to risk nonparticipation in the Board's proceedings. We will not now permit the Respondent to escape the consequences of its own conduct in this case or to further delay a resolution of the issues by misconstruing the limits of due process.

3. The court of appeals upheld the Board's decision and enforced its order (Pet. App. 3). The court stated that "[t]he record as a whole clearly and convincingly supports the Board's conclusion [that petitioner refused to execute an agreed upon contract]" (Pet. App. 32).

The court added that petitioner's argument concerning the continuance "is not persuasive either. \* \* \* The Company had from March 12 until April 3 to assure itself that Carman could be present or to depose him. No effort

was apparently made to have Romer, the Company's president, testify although he was 'in the Los Angeles area' on the day of the hearing" (Pet. App. 33).

#### ARGUMENT

1. There is a threshold question concerning the jurisdiction of this Court to entertain the petition. The petition was filed on July 28, 1976, ninety-one days after denial of the petition for rehearing. Assuming that the ninety day period for filing the petition began to run on the date that rehearing was denied (the court's judgment was entered on March 4, 1976, at the time the opinion was handed down), the petition is untimely since no extension was granted and the 90-day period provided by 28 U.S.C. 2101(c) for petitioning in civil cases expired July 27, 1976.

However, the decree enforcing the Board's order was not entered until August 3, 1976, 8 days after the petition was filed. This Court held in *Scofield v. National Labor Relations Board*, 394 U.S. 423, 427, that where petitioner receives no notice of the earlier entry of judgment "the relevant date is that of the entry of the decree." The Court explained that its ruling there did not represent an abandonment of "the standard that a 'judgment \* \* \* is final when the issues are adjudged' and settled with finality" but was predicated on the factual posture that there "no notice was given and it could not have been clear to petitioners whether there was [an earlier] judgment or not \* \* \*."

Here, however, there is no issue of lack of notice. Petitioner obviously considered the 90-day period to have commenced on the date of the denial of rehearing (see Pet. 2). Indeed, the "decree" was not entered until after the petition was filed. In these circumstances, and since no issue is raised concerning the form of the order em-

bodied in the decree, *Scofield* would appear to be inapplicable and, since the time limit specified by 28 U.S.C. 2101(c) is jurisdictional, the petition should be denied.

2. In any event, there is no reason for further review. The petition raises two issues: whether substantial evidence supports the Board's findings that petitioner agreed to a collective agreement, and whether the Board abused its discretion in denying petitioner a continuance. Neither of these questions raises issues warranting review by this Court. As shown above, the Board's evidentiary findings are amply supported by the record. Similarly, for the reasons set forth by the Board (*supra*, pp. 5-6) and the court of appeals (*supra*, pp. 6-7), the Board properly denied petitioner's requests for a continuance and to reopen the record.

#### CONCLUSION

The petition for a writ of certiorari should be denied.  
Respectfully submitted.

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SEPTEMBER 1976.